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No. 10-412

Supreme Court, U.S.
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In The Supreme Court of The United States

VANDERBILT UNIVERSITY,
Petitioner,

v.

ICOS CORPORATION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

SUPPLEMENTAL BRIEF

Kurt C. Rommel
James T. Carmichael
MILES & STOCKBRIDGE P.C.
1751 Pinnacle Drive
Suite 500
McLean, Virginia 22102
(703) 903-9000

Robert C. Brennen
Counsel of Record
Donald E. English
MILES & STOCKBRIDGE P.C.
10 Light Street
Baltimore, Maryland 21202
(410) 727-6464
rbrennen@milesstockbridge.com

Counsel for Petitioner

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Newegg, Inc., Pregis Corporation, Public Knowledge, Computer & Communications Industry Association, SAP America, Inc., Securities Industry and Financial Markets Association, TEVA Pharmaceuticals USA, Inc., Toyota Motor Corporation, Trimble Navigation Limited, Verizon Communications Inc., Wal-Mart Stores, Inc., Yahoo!, Inc., and thirty-six other law and economics professors filed eleven briefs *amicus curiae* in support of a petition for writ of certiorari filed by Microsoft Corporation in *Microsoft Corp. v. I4I Limited Partnership, et al.*, No. 10-290. Those briefs revealed that there is broad support across a number of significant industries for the uniform application of the preponderance of evidence burden of proof to civil actions under the Patent Act. These eleven briefs filed by fifty-four *amici* apply with equal force to Vanderbilt's Petition for Writ of Certiorari; indeed, it would be inconsistent for the Court to grant Microsoft Corporation's petition without granting Vanderbilt's Petition.

Microsoft Corp. v. I4I Limited Partnership addresses the Federal Circuit's imposition of a clear and convincing burden of proof in the context of an invalidity claim under Section 282 of the Patent Act, 35 U.S.C. §282. The basis upon which the Federal Circuit has imposed that higher burden in Section 282 cases, and which is attacked by the Microsoft *amici*, is the presumption of validity extended to patents. This is the identical justification used by the Federal Circuit for imposing the heightened burden of proof in Section 256 cases, which is the focus of Vanderbilt's petition. *Hess v. Adv. Cardio. Sys., Inc.*, 106 F.3d 976, 980 (Fed. Cir. 1997). Thus,

if the Supreme Court were to grant Microsoft's petition and rule in *Microsoft Corporation v. I4I Limited Partnership* that the burden for proving invalidity is preponderance of the evidence, such a holding would eviscerate any justification for imposing the higher clear and convincing standard upon Section 256 cases. Therefore, it is in the interest of justice that the Court considers the Vanderbilt petition in conjunction with the Court's consideration of the Microsoft petition.

Respectfully submitted this 13TH day of October, 2010,

Robert S. Brennen
Counsel of Record
Donald E. English, Jr.
MILES & STOCKBRIDGE P.C.
10 Light Street
Baltimore, Maryland 21202
(410) 727-646
rbrennen@milesstockbridge.com

Kurt C. Rommel
James T. Carmichael
MILES & STOCKBRIDGE P.C.
1751 Pinnacle Drive, Suite 500
McLean, Virginia 22102
(703) 903-9000
Counsel for Petitioners